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Honourable President of the Judicial Yuan,
Honourable Justices,

Ladies and Gentlemen,

I am very honoured and pleased to be here in Taipei at the Judicial Yuan. Thank you very much for your generous invitation.

I have the pleasure to talk to you today about the Venice Commission of the Council of Europe and the World Conference on Constitutional Justice.

I would like to split my presentation in two major parts. First, with your approval, I would like to talk about institutional aspects of the Council of Europe – distinguishing it from the European Union – then present you the work of the Venice Commission and the World Conference on Constitutional Justice. This order is a chronological and evolutionary one. The Venice Commission is an institution established 1990 within the Council of Europe. The World Conference was created with the help of the Venice Commission first in 2009 and formally in 2011.

In a second part, I would like to talk in substance about two major aspects of the work of the Venice Commission, on the independence of the ordinary judiciary and finally on individual access to constitutional justice, a topic which is dear to the Venice Commission and me personally.

In the first, institutional part of my presentation let me start with the Council of Europe

I. Council of Europe

The Council of Europe is the oldest pan-European international organisation. The Council was established in in 1949. It covers with 47 countries nearly all of Europe. In Europe, only Belarus and Kosovo are not members. Belarus was not admitted because of its autocratic form of Government. Kosovo has not joined yet because following its secession from Serbia it is not recognised as an independent state by all Council of Europe member States. The issue of full

membership of Kosovo in the Council of Europe is hotly debated. I will come back to this issue when talking about Kosovo's membership in the Venice Commission.

The boundaries of the Council Europe are political rather than geographic. Russia and Turkey are members but they have the larger part of their territory in Asia. According to a geographical definition, lying on the south rim of the Caucasus Mountains, Armenia, Azerbaijan and Georgia are in Asia but they all became full members of the Council of Europe.

In parallel to the establishment of the Council of Europe, which has democracy, the protection of human rights and the rule of law as the main pillars of its work, economic cooperation was launched with the European Coal and Steel Community in 1950 and with the European Economic Community in 1957. These two organisations later became the European Union. The Council of Europe and the European Union are therefore two separate international organisations.

A. Distinction between the Council of Europe and the European Union

Unfortunately, even European lawyers and journalists often confuse these two organisations. This is understandable because there are many similarities and the naming of some bodies contributes to this confusion.

As I pointed out, the Council of Europe with its seat in Strasbourg, France, is an international organisation of 47 member states. The European Union has 28 member States. Its main seat is in Brussels, Belgium. The European Union has a several organs and unfortunately, a key organ has a name very similar to the Council of Europe. The meetings of the Heads of State or Government (e.g. the German Chancellor Merkel, the French President Hollande and 26 others) of the European Union, are called the European Council. I hope that the distinction between Council of Europe and European Council translates well into Chinese.

Confusing is also that the Council of Europe has a Parliamentary Assembly, which is composed of 318 representatives (and the same number of substitutes) appointed by the 47 member states' national parliaments. The Assembly is thus composed of delegations of national MPs who gather in Strasbourg for their four sessions per year. The Assembly elects the Council of Europe's Secretary General, the Human Rights Commissioner and the judges to the European Court of Human Rights; it provides a democratic forum for debate and monitors elections.

On the other hand, the European Parliament is a legislative body of the European Union which comprises 766 members. The citizens of the 28 Member States of the EU directly elect their European Members of Parliament by universal suffrage. While the seat of the European Commission, the "Government" of the European Union is in Brussels, the European Parliament has its seat in Strasbourg, France, where it meets 10 times per year. One session per year is held in Brussels.

The European Courts too are sometimes mixed up. The European Court of Human Rights is based in Strasbourg. It is composed of one Judge for each of the 47 States party to the European Convention on Human rights and ensures, in the last instance, that contracting states observe their obligations under the Convention. Every person can directly apply to the European Court of Human Rights after exhausting national remedies, that is after having brought their cases up to the highest national court, the Supreme Court or a court of appeal, depending on the nature of the case.

On the other hand, the European Union has its Court of Justice in in Luxembourg. It ensures compliance with the law in the interpretation and application of the European Treaties of the European Union. With some exceptions, individuals do directly appeal to this Court. When a

judge in a member state has doubts about the interpretation of applicable EU law, he or she can stay the case at hand and can send a "preliminary request" to the Court of Justice. The Court of Justice will decide on this issue and finally the national judge resumes the original case, taking into account the judgement of the Court of Justice. Courts at all national instances can make such a request but the supreme courts of the Member States are even obliged to do so.

The Council of Europe is a classical intergovernmental organisation. Therefore its main decision-making body, the *Committee* of Ministers, is made up of the ministers of foreign affairs of the member states or their permanent representatives in Strasbourg.

Conversely, in the European Union, national governments are represented in the *Council* of Ministers. Depending on the topic discussed, the Council is composed of the Ministers in charge of that issue, that is to say Ministers of Agriculture, Economy, Justice, etc.

The EU is thus not considered being part of foreign affairs. The EU interacts much more directly with the national administration.

B. Nature of legal acts

We can see this difference also in the legal acts which are produced in the Council of Europe and the European Union. The main instruments of the Council of Europe are recommendations by the Committee of – foreign - Ministers and treaties, which are called "conventions" in the Council. The Council of Europe has elaborated more than 200 conventions; the most well-known one is of course the European Convention on Human Rights.

As international treaties, these conventions have to be signed and ratified to become binding in respect of the member States. The European Convention on Human Rights has been ratified by all 47 member States of the Council of Europe but some of its additional protocols have not been ratified by all members. Other conventions have been ratified only by a few states for which they are binding.

On the other hand, there are conventions which are open to signature even by non-European States[2], like the European Convention on Extradition to which Korea is a party or the Convention on the Transfer of Sentenced Persons, which has numerous non-European parties, including Mongolia, Korea, Japan and the Philippines in Asia.

While the conventions of the European Union require classical ratification, the legal acts of the European Union pervade much more intensely the legal order of the EU member States. On the basis proposals by the European Commission – the EU Government – the Council of Ministers together with the European Parliament adopts legal acts, which are called directives and regulations. Directives need further implementing legislation by the Member States, even of the margin for legislative choices by the member states is often quite limited.

Regulations pervade national law even more. They are directly applicable in the member states without any further transformation and if there is a contradiction between national laws and EU law, the latter prevails. This is a key element why the European Union is often called "supra-national".

Admittedly, there is a latent issue as concerns the relationship between national constitutions and EU law. Part of doctrine and several constitutional courts insist on the supremacy of the

[2] http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/openings/NON_EU?p_auth=h9RrWU2I

constitution. Other scholars and notably the European Court of Justice insist on the primacy of EU law in all cases.

Happily enough, all stakeholders will do their utmost to avoid that this question ends in a serious conflict.

The Solange judgements of the German Federal Constitutional Court have shown that a strong national court can have a serious impact on the Luxembourg Court, which – in order to avoid an open conflict on the supremacy of national constitutions – was forced to develop a human rights jurisdiction even without having a legal basis to do so.

C. What are the major fields of activity of the Council of Europe?

Every country which joins the Council of Europe agrees to be subject to independent monitoring mechanisms which assess its compliance with human rights and democratic practices.

One excellent example is the Council of Europe's Committee for the Prevention of Torture, which regularly makes unannounced visits to places of detention in the 47 member states (prisons, police stations, holding centres for foreign nationals, psychiatric clinics) in order to evaluate the way in which people deprived of their liberty are treated. The work of this Committee is invaluable for everyone who is in detention in Europe.

Even if with the right to property and the prohibition of discrimination, social rights do play an important role in the case-law of the European Court of Human Rights, it is the European Committee of Social Rights which verifies that the rights such as the right to housing, health, education and employment guaranteed by the European Social Charter are implemented by the countries concerned. Individuals and even trade unions can bring complaints to the Committee, which decides in a court like procedure.

Another example is the Group of States against Corruption (Greco), which identifies deficiencies in national anti-corruption policies and encourages states to carry out the necessary legislative, institutional or administrative reforms.

The Council of Europe played a pioneering role in the struggle for the abolition of capital punishment. In April 1983 it adopted Protocol No. 6 to the European Convention on Human Rights abolishing the death penalty, followed in May 2002 by Protocol No. 13 on abolition in all circumstances, including during war time. The Council of Europe has made abolition of the death penalty a precondition for accession. No executions have been carried out in any of the Organisation's 47 member states since 1997. This is also a reason why Belarus has not been admitted as a member of the Council of Europe.

The Council of Europe carries out various activities to protect minorities, including the largest minority in Europe, the Roma. The European Commission against Racism and Intolerance analyses these problems and makes regular recommendations to the 47 member states of the Council of Europe.

The Council of Europe Convention on preventing and combating violence against women is based on the premise that such violence cannot be eradicated unless efforts are made to achieve greater equality between women and men.

The Council of Europe also plays a leading role in the fight against discrimination for reasons of sexual orientation or gender identity.

Finally, the Framework Convention for the Protection of National Minorities provides for a monitoring mechanism which evaluates and improves the protection of minorities in the countries concerned.

D. European Court of Human Rights

Without doubt the body within the Council of Europe, which is most well-known abroad is the European Court of Human Rights.

1. Establishment and jurisdiction

The European Court of Human Rights was set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998, it sits as a full-time court. Individuals can apply to it directly. The judgments are binding on the parties to the Convention and have led governments to change their legislation and administrative practice in a wide range of areas. The Convention guarantees *inter alia* :
• the right to life,
• the right to a fair hearing,
• the right to respect for private and family life,
• freedom of expression,
• freedom of thought, conscience and religion and,
• the protection of property.

The Convention prohibits in particular:
• torture and inhuman or degrading treatment or punishment,
• slavery and forced labour,
• the death penalty,
• arbitrary and unlawful detention, and
• discrimination in the enjoyment of the rights and freedoms set out in the Convention.

I will not go into detail on the work of the European Court of Human Rights but we can of course broach this topic in our discussion.

Access to the Court is open to states and to individuals regardless of their nationality. This means that even non-Europeans, for instance citizens of Taiwan, can bring an application against one of the member states, which hasbreached their human rights. However, the individuals first have to exhaust all legal remedies in the country concerned.

2. Reform

Only a few years ago, the future of the European Court of Human Rights was seriously compromised. In 2011, it had 160.000 cases pending and while it condemned its member states for the excessive length of judicial proceedings, its own cases lasted longer and longer - for years. The reason was that following the fall of the Berlin wall and the rapid expansion of the Council of Europe in Eastern Europe, tens of thousands of applications came from the new member States from people who rightly saw the Court as an effective means to remedy problems in their country. The Court thus became a victim of its own success.

In order to ensure the survival of the Court, it had to undergo a radical reform. Once it was finally ratified after a long period of resistance from Russia, Protocol 14 to the Convention brought about a simplification of procedures. Decisions on inadmissibility are no longer made

by committees of three judges but by a single judge. Similar cases are grouped together in so-called “pilot cases” and the Registry of the Court was not only recruiting many new lawyers but it also streamlined its internal procedures.

As a result of these measures, it was possible to bring down the number of pending cases from 160.000 in 2011 to less than 60.000 this year. It remains to be seen whether this figure can be further reduced, given that a high number of inadmissible cases was already weeded out and the remaining part of the docket probably includes the more serious cases. Now, the Council of Europe looks into ways to improve the human rights on the national level, notably by improving individual access to constitutional courts where they exist. I will deal with this topic further on.

What is important is that notwithstanding all these reforms the right of each of the 800 million ‘citizens’ of the Council of Europe retained the right to directly bring a case to the Court.

3. Current challenges

Having overcome its “case-load crisis” the European Court of Human Rights still faces serious political challenges.

The Government of the Russian Federation was seriously displeased with several judgements against Russia. The execution of some judgements – the execution of judgements of the European Court of Human Rights is supervised by the Committee of Minister of the Council of Europe - drags on and on.

A group of Russian MPs brought a challenge against the Convention to the Constitutional Court. In July of this year, the Russian Court did confirm the constitutionality of the accession of the Russian Federation to the Convention. At the same time it held that in specific cases the execution of judgements of the European Court of Human Rights could violate the Russian Constitution and that it was for the Constitutional Court to decide when this was the case.

So far, no such cases have been brought to the Russian Constitutional Court but there is some concern within the European Court of Human Rights and the Council of Europe that such cases could soon come up, notably relating to high profile judgements, which involve the payment of huge amounts of compensation.

Another – potentially even more serious - conflict opposes the United Kingdom to the European Court of Human Rights. In the case Hirst v. UK, the European Court held that the UK violated the Convention when it denied all prisoners without distinction the right to vote[3]. This judgement has not been implemented in the UK and – probably to avoid outright conflict – the Committee of Ministers postponed this execution to 2015.[4] In a second Judgement, Scoppola v. Italy (No. 2), the position of the Court was attenuated somewhat but the main issue remains unresolved.

For the British public, other judgements are even more contentious. In Abu Qatader vs. UK the Strasbourg Court prevented the expulsion of an Islamist hate preacher to Jordan because of the danger that he might be tortured there.

[3] For arguments for and against implementation, presented to the House of Lords, *European Court of Human Rights rulings: are there options for governments?*, Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/5941.

[4] Decision adopted by the Committee of Ministers at the 1208th meeting (23 25 September 2014), http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_EN.asp?CaseTitleOrNumber=hirst&StateCode=UK.&SectionCode.

This discussion first came up in tabloids only but later but also the UK Government took up this issue and announced that it intends to break the formal link between British courts and the European Court of Human Rights.[5] Even the issue whether the United Kingdom should leave the European Convention on Human Rights is seriously considered in Parliament.[6]

It is yet unclear what the British Government will do because at the same time it prepares a referendum on the exit from the EU and the conflict with the European Court of Human Rights is rather the smaller battlefield in this wider picture.

Today the most likely outcome seems to be that the UK Human Rights Act, which gave British judges the right to directly apply the European Convention on Human Rights, might be repealed and be replaced with a separate bill of rights for the United Kingdom.

As such, compared to the situation of other Council of Europe member States, nearly all of which have their own bill of rights, this outcome would not be outrageous. UK judges could of course continue to uphold the European human rights standards by referring to the new bill of rights and even on the basis of common law, as they did before the entry into force of the Human Rights Acts in 1998. However, much will depend on the formulation of such a bill of rights and any possible limits on human rights which it might contain.

Even more dangerous would be a decision to leave the European Union - newspapers refer to it as “Br-exit”. This would be a major problem in itself but it could even be followed by the United Kingdom leaving the separate Council of Europe and, as a consequence, the European Convention on Human Rights.

Personally, I think that the latter consequence of a Brexit is unlikely but we cannot be sure until we know the result of the referendum on UK membership in the European Union, which is now expected for the second half of the year 2016.

Worrying is also that even in Switzerland a wave of resentment against the European Court of Human Rights has built up, especially on the right wing of the political spectrum. This may be related to the traditional Swiss insistence on its independence and the rejection of the idea of “foreign judges”. While it is unlikely that Switzerland would leave the European Convention on Human Rights, such discussions probably contributed to the insistence of Switzerland on ‘subsidiarity’ in the process of reform of the Court.[7]

Notwithstanding these current challenges, the European Court of Human Rights is highly respected in its member states and with the exception of very few judgements the member States do implement its decisions.

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[5] Conservatives plan to scrap Human Rights Act – read the full document http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-huf.man-rights-act-full-document.

[6] Theresa May: Tories to consider leaving European Convention on Human Rights: http://www.bbc.com/news/uk-politics-21726612; see also arguments presented by Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/6577

[7] Swiss Parliament: 13.3237 – Interpellation, *Kündigung der Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20133237; *La Suisse sera plus isolée si elle dénonce la Convention*, interview with Prof. Walter Kälin, http://www.tdg.ch/suisse/La-Suisse-sera-encore-plus-isolee-si-elle-denonce-la-Convention/story/22597456/print.html; Bundesrat vehement gegen Kündigung der Menschenrechtskonvention, http://www.nzz.ch/aktuell/schweiz/bundesrat-vehement-gegen-kuendigung-der-menschenrechtskonvention-1.18082582.

II. European Commission for Democracy through Law - Venice Commission

From the European Court of Human Rights, let me turn to the European Commission for Democracy through Law of the Council of Europe, which was founded in 1990 and which is an advisory body of the Council of Europe.

Its name reveals its purpose: its work consists of devising a legal framework that regulates the forces of democracy, thereby protecting the minority – whether political, ethnic or linguistic – from being subjected to the excesses of the majority. This framework is known as the constitution of a country, which defines the respective powers of parliament, government and the courts.

However, even this Commission itself does not use its own complicated name. Everyone calls it the Venice Commission because of its seat in the city of the Doges, where it meets four times per year.

Its work consists of assisting its member and observer states to improve their constitutions, their legislation and the functioning of their democratic institutions.

The main activity of the Venice Commission is providing advice for the preparation of constitutional reforms and implementing legislation, covering electoral legislation, laws on the constitutional court, laws on the judiciary, ombudsman laws, laws on the functioning and financing of political parties or legislation on specific human rights like the freedom of association or the freedom of assembly.

Opinions, reports and studies of the Venice Commission are part of the "common constitutional heritage". Positions of the Commission on matters of constitutional law are often quoted by international bodies and national governments. Supreme courts and constitutional courts refer to its opinions in their judgments and academic research is increasingly dedicated to the work of the Venice Commission.

A. How is the Venice Commission composed?

The Venice Commission has two levels of membership, first the States who are admitted by decisions of the Committee of Ministers of the Council of Europe.

Notwithstanding the fact that is it part and parcel of the Council of Europe, the Venice Commission is open to the participation of non-European countries and has a total of 60 member states, including all 47 Council of Europe member States. Last year, the Committee of Minister admitted Kosovo as the most recent member of the Venice Commission, even if it is not yet member of the Council of Europe.

The Venice Commission also has 12 non-European members. It was perhaps also the unique setup of the Venice Commission and the usefulness of the services it provides that triggered the interest of countries from outside Europe in the work of the Venice Commission. Soon after its creation as a partial agreement[8] of the Council of Europe by 18 out of its then 23 member states, a number of non-European countries became interested in the Venice Commission and sought observer status[9].

[8] A partial agreement is a particular form of arrangement, which allows some member States of the Council of Europe to participate in an activity in spite of the abstention of other member States.

[9] Argentina, Canada, the Holy See, Israel, Japan, Kazakhstan, Mexico, the United States and Uruguay. South Africa has a special co-operation status, which is equivalent to that of an observer.

The strong interest, witnessed by the accession of all 47 member States of the Council of Europe and a number of non-European countries[10], is probably due to the fact that there is no comparable body on the international level. While a number of governmental and non-governmental organisations also provide constitutional advice, they lack the specific combination of expertise, notably that of a collegiate group of independent experts who nonetheless operate within the framework of an intergovernmental organisation, which gives them institutional access to state bodies in the countries they work with.

While undeniably a European body, the Venice Commission's Statute, first as a partial agreement and even more so since its conversion into an enlarged agreement[11] in 2002, allowed the Commission to accept the expression of interest in its work from abroad. When pursuing the basic principles of the Council of Europe, which are democracy, the protection of human rights and the rule of law, the Commission is well aware that these are not only European, but truly universal values and that much can be gained by exchanging information and experience not only within our continent, but also with other regions of the world.

For example, Kyrgyzstan, with which we had a very close and fruitful co-operation since the mid-1990s, became a full member in 2004; Chile became a full member in 2005, the Republic of Korea in 2006, Morocco and Algeria in 2007, Israel in 2008, Peru and Brazil in 2009, Tunisia and Mexico in 2010 and Kazakhstan in 2011. In 2013, the United States of America joined.

The accession of Kosovo last year was a difficult matter because several member States of the Council of Europe do not recognise Kosovo as an independent State and it is not member of the United Nations. Nonetheless Kosovo obtained the necessary two thirds majority in the Committee of Ministers.

The status of associate member and observer was frozen in 2002 and only those countries, which then already held that status were able to retain it, for example Argentina and Canada remain observers – a status they held already in 2002 - but no other countries can become observers since then.

The second layer of membership is the individual members, appointed by the Governments for a four year term.

The individual members meet four times a year in Venice, which is the seat of the Commission, given that it was Italy that made the proposal to establish the Commission right after the fall of the Berlin wall.

According to the Venice Commission's Statute, the Governments appoint renowned experts in the fields of constitutional law and political science as individual members of the Venice Commission.

In practice, most members are judges of constitutional judges or professors of law.

What is most important is that the members do not represent the State which has appointed them. They always act in their individual capacity as independent experts. The independence of the members of the Venice Commission is crucial for the acceptance of the opinions provided by the States concerned.

[10] All Council of Europe member States are members of the Venice Commission : Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, United Kingdom.

[11] In February 2002, the Commission became an enlarged agreement, allowing non-European states to become full members.

Indeed, the members take their independence very seriously. A member who would staunchly defend the position of his or her Government would quickly lose any credibility within the Commission.

B. Who can request opinions from the Venice Commission?

The Commission is at the service of its Member States and only acts upon request, which can come from the State concerned, the organs of the Council of Europe or international organisations that participate in the work of the Venice Commission (European Union, OSCE/ODIHR).

Requests for opinions on all subjects can be made by State authorities, the President of the Republic, Parliament and the Government. Other State institutions can request opinions relating to their own institutional setup.

In practice, most of the requests for advice come from Governments and Parliaments but the Commission also provides *amicus curiae* briefs to Constitutional Courts when they ask for them.

C. What are the standards used by the Venice Commission?

The Venice Commission sees its purpose in providing tailored advice to each individual country, taking into account its specific historical and political background and the needs of its society. Since there is no such thing as a perfect constitution that could fit all countries, the Venice Commission will accept, on the basis of common standards, the fundamental choices made by a country, but will also try to aim for a coherent system. It will do so, for instance, by accepting a country's choice for a strong executive, but at the same time insist on appropriate checks on government by parliament and, probably even more importantly, by the judiciary.

By adopting such an open attitude, the Venice Commission has succeeded to win the trust of countries it is working with. The drafters of a country's constitution are aware that their basic wishes will be taken into account and in turn, recognise that the Venice Commission's recommendations are helpful in drafting a more coherent constitution or legislation.

In the field of human rights, the standards applied are those expressed in the European Convention on Human rights as developed by the European Court of Human Rights. You may ask whether we refer to these standards also in non-European countries and indeed we do. The European Convention is based on the Universal Declaration of Human Rights and the human rights are universal. Therefore, the case-law of the European Court is of interest for non-European countries as well.

The Venice Commission refers extensively to soft law as well. Notably in the field of the judiciary, many applicable texts are only recommendations, from the Committee of Minister of the Council of Europe or even standards developed outside the framework of international organisations, like the Bangalore Principles of Judicial Conduct. What counts is not whether these standards are legally binding but whether reference to them is coherent in the case at hand.

In addition to any written standards, the Venice Commission always makes recommendations based on common sense. Often, the draft laws examined are the fruit of a weak compromise but the Commission will try to explain that even if some of these weak solutions may allow a law to be adopted more easily but they will result in serious problems in applying this law. The

Commission's members remember not only good solutions but they also know what already failed elsewhere.

All these elements flow into the Common Constitutional Heritage, which is not a precise text but is an emanation of the shared wisdom from many jurisdictions world-wide.

In rare cases, the Venice Commission has been accused of applying "double standards", requesting more from Eastern European countries than is applicable in the West. Those who raise this argument may do so because they reject the advice given. In fact, the Venice Commission openly says that the legislation in some old democracies is far from perfect and allows for abuse. However, these old democracies had time to develop a legal culture that prevents them from abusing these powers for the common good. A typical case is the appointment of judges by the respective Minister of Justice of the German provinces, the *Länder*. Such a system is open to abuse but, in practice, the German *Länder* Ministers are quite careful in using this power. Apply such a system in some post-Soviet States and the Minister in charge will make sure that the judges who he or she appointed will hand down decisions as desired by the Minister. Therefore, we do ask new Democracies to establish safeguards, which do not – yet – exist in Germany or other older democracies. The development of a legal culture which prevents abuse is in fact far more difficult than adopting good laws.

D. Method of dialogue

The Venice Commission has developed a method of dialogue with its partners.

For the members of the Commission it is essential not to give advice on the basis of abstract legal texts but to come to the country requesting assistance to discuss the issues arising with all stakeholders in order to obtain a wider picture on the problems faced in the country.

This ensures that we obtain a clearer and wider picture of the problem in question – as well as being able to address the issues raised in a helpful and constructive manner.

When the Commission intervenes in a country it does not play on the side of one political force against another. The Commission has in mind a much longer perspective and doesn't pay so much attention to the persons in power or in the opposition at a particular moment.

This dialogue enables the Commission to provide advice, which is "tailor made" for the beneficiaries, while taking into account the common standards in the field of democracy and the protection of human rights.

As pointed out above, the members of the Venice Commission provide their advice on the basis of the Common Constitutional Heritage and – to the extent possible - they try to take into take into account legal traditions and history of the country concerned.

The Commission indeed does refer to national traditions. However, this term has often been abused to shield greedy politicians against any reform that could endanger their corrupt practices. Such rhetoric, in fact, has nothing to do with real traditions. It is a hoax and the Commission is not to be tricked by it.

The role of the Venice is a practical one: we strive to understand how to reduce the gap between *de jure* and *de facto* norms, how to guarantee that legal mechanisms really work and improve the quality of the society, of government and human rights. We don't want constitutions to remain a dead letter.

E. Constitutional Justice

Let me turn to a field of work, which is dear to the Venice Commission – constitutional justice.

While assistance in the drafting process of constitutions and para-constitutional legislation is the main objective of the Venice Commission, it was clear from the outset that these texts must also be implemented in order to be effective. Programmatic constitutions, such as the one that existed in the Soviet Union, which proclaimed human rights that were not granted in reality, are useless for society. The Venice Commission has therefore turned to the bodies which oversee the implementation of the constitution and its principles, the judiciary and especially constitutional justice.

Today, there is general agreement that ordinary legislation has to be in conformity with the Constitution.[12] As a consequence, a large majority of countries have entrusted the control of the conformity of laws with the Constitution to courts, either the ordinary courts or specialised constitutional courts.

Since its establishment, the Venice Commission supported the idea of an international dialogue of constitutional judges – be they judges of specialised constitutional courts or judges of supreme courts exercising constitutional and human rights review.

The word “cross-fertilisation” is used to describe the essence of our work in the field of constitutional justice.

F. Direct support for constitutional courts under pressure

Unfortunately Constitutional Court and equivalent bodies sometimes come under serious pressure from other state powers – or the media controlled by them. The Venice Commission has often intervened to defend the courts in such cases.

In 1998, the Commission organised a seminar together with the Constitutional Court of Ukraine on the budget of the Court, which was likely to see a radical cut of its budget as a “punishment” for some unwelcome judgments. The seminar allowed to draw the attention of the Government and of Parliament to the fact that such reductions are at least 'unusual' in other countries. The radical cuts were called off after the seminar. A similar conference was held in Bosnia and Herzegovina in 2004[13].

In 2002, the Venice Commission asked its President to write a letter to the Albanian authorities to share the Commission's concerns about the non-implementation of a judgement of the Constitutional Court on the dismissal of the Prosecutor General.[14]

In discussions with the respective Presidents of Georgia and Kyrgyzstan, the President of the Venice Commission prevented the outright abolition of the Constitutional Courts of these countries.

In 2005, the Venice Commission and the Lithuanian Presidency of the Conference of European Constitutional Courts made a joint declaration in favour of the Constitutional Court of Ukraine,

[12] H. Steinberger, Models of Constitutional Jurisdiction, CDL-STD(1993)002, p. 3.
[13] http://www.venice.coe.int/webforms/events/default.aspx?id=17 .
[14] http://www.venice.coe.int/webforms/documents/?pdf=CDL-PV(2002)051-f see item 17.

which was unable to sit because, following the retirement of several judges, it no longer had a quorum and Parliament refused to take the oath of judges who had already been appointed[15]:

Following the second revolution in Kyrgyzstan, the President of the Commission sent a letter to the President of Kyrgyzstan asking him to drop criminal charges against the judges of the former Constitutional Court.

In 2012, the President of the Venice Commission had to make even two statements in favour of the Constitutional Court of Romania, which was hard pushed by the Government to condone the unconstitutional suspension of the President of the Republic.[16]

In 2013, the President of the Venice Commission had to assist the Constitutional Court of Moldova, which was threatened by a dismissal of all its judges because – following a judgement strongly displeasing the governmental majority – Parliament had enacted a procedure for a vote of non-confidence in the Judges of the Court.[17]

Sadly, the independence of the Judiciary in Turkey is under serious threat. Last year, the President made two statements in favour of the Constitutional Court[18] and the ordinary judiciary[19]. In view of the deepening crisis of the Judiciary in Turkey, the whole Commission adopted a strong declaration in June 2015.[20]

In parallel to these statements, numerous opinions of the Venice Commission stressed the importance of a strong and independent Constitutional Court (e.g. on the fourth amendment to the Fundamental Law of Hungary[21] and previous opinions on amendments to the law on the Constitutional Court of Romania[22]).

Finally, the Venice Commission also provides *amicus curiae* opinions upon request by the constitutional courts. Sometimes the Courts seeks such an opinion to prevent pressure from other State powers and *amicus curiae* opinions from the Venice Commission can protect them against such attacks[23].

G. Practical tools for co-operation with constitutional courts – the CODICES database

As a basis for the dialogue with and between the Courts, the Venice Commission provides a permanent platform for exchange of information. For courts in the Commission's member and observer states we publish the Bulletin on Constitutional Case-Law. The CODICES database is available to Courts on the world-wide basis in the framework of regional agreements and the World Conference on Constitutional Justice, which I will present soon.

The CODICES database presents the leading constitutional case-law of some 90 Constitutional Courts, Constitutional Councils, Supreme Courts in Europe, Asia, Africa and the Americas, as

[15] http://www.venice.coe.int/files/2005_12_17_ukr_declaration_appointment_cc_judges_E.htm. The Venice Commission later prepared an opinion on how to avoid such a situation in the future: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)016-e.
[16] http://www.venice.coe.int/webforms/events/?id=1544 and http://www.venice.coe.int/webforms/events/?id=1557.
[17] http://www.venice.coe.int/webforms/events/?id=1703.
[18] http://www.venice.coe.int/webforms/events/?id=1858
[19] http://www.venice.coe.int/webforms/events/?id=1811.
[20] http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf.
[21] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e.
[22] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)006-e.
[23] http://www.venice.coe.int/WebForms/documents/search.aspx look for "amicus".

well as from the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights.

CODICES contains more than 9000 Court decisions (summaries, called précis, in English and French as well as full texts of the decisions in 43 languages) together with Constitutions, laws on the Courts and descriptions explaining their functioning.

The contributions presented in CODICES are prepared by liaison officers appoint by the Courts themselves. This is essential for guaranteeing the quality of the information presented.

CODICES – abbreviation

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of COnstitutional CasES

The Venice Commission hosts this database in Strasbourg and updates it regularly. CODICES exists as a free on-line version at www.CODICES.CoE.int and as a DVD for users who have problems with Internet access (the on-line version is updated in average every two weeks, whereas the DVD is published only three times a year).

The précis (case-law), the Constitutions and the laws on the Courts are searchable in full text, as well via the detailed Systematic Thesaurus of constitutional law.

The highlight of CODICES is the system of extensive links between the various parts of the database. Each reference to an article of a national constitution is linked to the text of the article. Conversely, a click on the articles of a Constitution brings up the pertinent case law of the Court. The European Convention on Human Rights and other international treaties are included in the database as well. As a consequence, a click on an article of the Convention brings up not only the case-law of the European Court of Human Rights but more importantly – because much harder to find elsewhere – the case law of the national Courts referring to that article of the Convention.

In addition to full text searches, CODICES uses a system of double indexing. The Systematic Thesaurus has two functions in CODICES: for each keyword of the Thesaurus, CODICES searches both in the précis – in the case-law – and in the articles of the constitutions.

The fixed Systematic Thesaurus specifically covers topics of constitutional law. In addition, the Alphabetical Index is composed of a free list of keywords from other fields of law – civil, criminal or administrative law as well as facts, e.g. abortion, land register etc.

CODICES contains thousands of full texts of judgements, in the original language or in translation.

Finally, CODICES contains descriptions of the participating courts, which enable the user to understand the differences in the jurisdiction of the Courts (e.g. *a priori* and *a posteriori* to the enactment of a legal act). The descriptions are present in a standard format and include basic texts, composition and organisation of the court, powers / jurisdiction, nature and effects of judgments.

I strongly encourage your Court to use this database, which is available also to the public at large. If need be I can make a short presentation of this database to your legal researchers during my visit here in Taiwan.

Finally, the liaison officers also have access to the confidential on-line Venice Forum, through which the courts can quickly provide and seek information from other Courts.

H. Co-operation with non-European Courts

Originally, the Venice Commission collaborated mostly with European constitutional and supreme courts. It did so by creating various platforms for professional exchanges of information: the Bulletin on Constitutional Case-Law, the CODICES database, the Venice Forum but also conferences and seminars with the Courts.

This co-operation soon attracted the attention of non-European courts, first in Africa (French Speaking Courts and English and Portuguese speaking Courts in Southern Africa) and in former countries of the Soviet Union.

Later, we started working with other regional partners, such as the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice (mostly Latin American Courts), the Conference of Constitutional Jurisdictions of Africa and the Association of Asian Constitutional Courts and Equivalent Institutions, the establishment of which the Venice Commission strongly supported.

III. World Conference on Constitutional Justice

In cooperation with these regional groups and linguistic groups uniting Constitutional Courts, Constitutional Councils and Supreme Courts[24], the Commission established the World Conference on Constitutional Justice for which has 97 Member Courts[25] and for which the Venice acts as the Secretariat.

So far, the World Conference held Congresses in 2009 in South Africa, in 2011 in Brazil and this year in Korea. The goal of the World Conference is to ensure long-term cooperation between constitutional courts, as well as exchanges of human rights case-law in order to strengthen democracy, human rights and the rule of law.

Finally, the Commission decided to bring together all the constitutional courts, constitutional councils and supreme courts at the first congress of the World Conference on Constitutional Justice.

The first congress took place in Cape Town, South Africa in 2009. The second congress was hosted by the Federal Supreme Court of Brazil in Rio de Janeiro and the third congress took place in Seoul in 2014 and was hosted by the Constitutional Court of the Republic of Korea. The next Congress will take place in September 2017 in Vilnius, the capital of Lithuania.

[24] Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Southern African Judges Commission, the Conference of Constitutional Control Organs of Countries of New Democracy, the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice and the Conference of Constitutional Jurisdictions of Africa, Commonwealth Courts.
[25] www.venice.coe.int/WCCJ.

Now the World Conference has become a permanent international body uniting apex courts from 97 countries. Only last week, the High Court of Australia joined the World Conference as a full member.

The purpose of the World Conference is to promote "cross-fertilisation", i.e. the exchange of ideas between different jurisdictions. We are persuaded that the free flow of ideas is no less beneficial for the world than the free flow of goods and capital. However, if you want to export your ideas, you should be prepared to open your domestic market to foreign influences, concepts and approaches. This is why we are talking about "cross-fertilisation": it is a two-way process.

We believe that the exchange of information and ideas that takes place between judges from various parts of the world in the World Conference furthers reflection on arguments, which promote the basic goals inherent to national constitutions.

Even if these texts often differ substantially, discussion on the underlying constitutional concepts unites constitutional judges from various parts of the world, committed to promoting constitutionality in their own country.

A major task of the World Conference is also to support the independence of its member Courts. This is why, since 2011, each congress deals with this topic, at least during one of the congress sessions.

The World Conference is ready to stand up for its members when they come under undue pressure from other State powers. Its Statute allows the Bureau of the Conference to offer good offices at the request of a court which is under pressure.[26]

IV. The Venice Commission's Report on the independence of judiciary

From the institutional part of my presentation, let me now turn to two main areas of the work of the Venice Commission. First, the independence of the ordinary judiciary and then individual access to constitutional justice

Judges are part of a complex system of courts on various levels, from first instance courts and appeal courts to supreme courts[27]. In addition to civil and criminal courts, in many countries there are specialised courts dealing for example with commercial, labour or administrative issues and some of them have their own hierarchic system of judicial instances. While there is no decision making hierarchy and no judge can give another judge instructions on how to decide cases[28], judges are dependent on others in a number of ways – as concerns their

[26] http://www.venice.coe.int/wccj/statute/2011/CDL-WCCJ(2011)001-e.pdf (Articles 1 and 4.b.7).

[27] The present article does not refer to Constitutional Courts, which are specialised in dealing constitutional aspects only. Often, constitutional courts remain outside of the judicial power, as set out in the various Constitutions. This does not mean, however, that many aspects of judicial independence would not relate to Constitutional Courts as well (see for example Recommendation CM/Rec(2010)12, para. 1). Often, constitutional courts differ however in the system of appointment and status of judges (see Venice Commission, The composition of constitutional court- Science and Technique of Democracy, no. 20 (1997), CDL-STD(1997)020).

[28] On this topic see Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001), para. 69.

appointment, training, promotion, discipline and salaries, to name but a few. The procedures regulating these issues are highly relevant for determining, in a case at hand, whether a judge is really free to make a judgment in an independent and unbiased manner.

A. Level of regulation

The Venice Commission's Report, like Recommendation CM/Rec(2010)12[29], insists that the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts. This logic was applied in the Hungarian case:

> *"While some principles, as well as the general structure, composition and main powers of the National Council of Judges and National Judicial Office, should have been developed in the Constitution itself, most of the details could have been left to ordinary laws that do not require a qualified majority in Parliament."*[30]

Regulations on a lower level lack appropriate guarantees, whereas regulations on a too high level are difficult to amend and can obstruct the necessary development of the judicial system.

B. Appointment system

In its earlier Report on Judicial Appointments, the Commission distinguished two major types of appointments – elective systems and direct appointment systems and warned against the dangers of the former. In particular, the Venice Commission was of the opinion that ordinary judges should not be elected by Parliament, because there was a great danger that "political consideration prevail over objective merits of a candidate"[31].

In its series of opinions on the judiciary of Bulgaria,[32] the Venice Commission regretted the complete replacement of the "parliamentary component" of the Supreme Judicial Council (11 out of the 25 members) after each change of parliamentary majority by simple majority vote. The Commission consequently called for an election of the parliamentary component of the judicial council by a qualified majority. The composition of judicial councils thus became one of the Commission's recurrent topics in the field of judicial independence.

The Commission preferred that the appointment of judges be made by an independent judicial council.[33] Appointments by the Head of State were however found to be acceptable, as long as he or she was bound by the decisions of an independent judicial council.[34] Such a Council

[29] Recommendation CM/Rec(2010)12, paragraph 7.
[30] CDL-AD(2010)004, paragraph 22.
[31] CDL-AD(2007)028, paragraphs 9-12.
[32] CDL-INF(1999)005, Opinion on the Reform of the Judiciary in Bulgaria; CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, adopted by the Commission at its 51st Plenary Session (Venice, 5-6 July 2002); CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria adopted by the Venice Commission at its 56th Plenary Session (Venice, 17-18 October 2003); CDL-AD(2008)009 Opinion on the Constitution of Bulgaria adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009; CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, adopted by the Venice Commission at its 85th Plenary Session, Venice (17-18 December 2010).
[33] However, the Commission was of the opinion that such a council should not be burdened with administrative organisation of the judiciary.
[34] CDL-AD(2007)028, paragraph 14.

should have a "decisive influence on the appointment and promotion of a judge and […] on disciplinary measures brought against them"[35].

C. Judicial councils

A central point of the Report on Judicial Appointment dealt with the composition of judicial councils. While accepting that there is no standard model for such councils, the Commission recommended that they should have a mixed composition, with a "substantial element or a majority" of judges and other "members elected by Parliament among persons with appropriate legal qualification taking into account conflicts of interest."[36] With this formula, the Commission tried to combine two conflicting principles. Judicial independence might be best served by a judicial council composed only of judges, but experience has shown that such councils tended to be lenient, especially in the field of judicial discipline, and when only judges appointed judges there was a danger of corporatism within a judicial caste, unaccountable to the public.

Referring only to the ordinary judiciary, the Venice Commission is of the opinion that an independent judicial council should have a "decisive influence on decisions on the appointment and the career of judges"[37]. Recommendation Rec(2010)12 of the Committee of Ministers of the Council of Europe accepts that decisions are made by the head of state, the government or the legislative power, but calls for input from an independent and competent authority.

The Commission goes further than that by recommending that "states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers."[38] The Commission wants these judicial councils to take the final decision in judicial appointments, not limit them to making recommendations.

1. Mixed composition , involving a non-judicial component

The other principle pursued was that of the uninterrupted chain of democratic legitimacy, developed in the German constitutional doctrine. According to this doctrine, all state bodies should have a direct or indirect link to the will of the sovereign people. By recommending to have part of the judicial council elected by Parliament, the Venice Commission sought to achieve a compromise between full judicial independence and democratic legitimacy of judicial appointments. The Commission limited the scope of Parliament's influence right away by insisting that active members of Parliament are not eligible. Moreover, a qualified majority vote should oblige the parliamentary majority to seek a compromise with the opposition. Ideally, they could settle on neutral candidates, but they would have to accept, at least, a balanced composition of the parliamentary component of the judicial council, which would include members close to the majority and others close to the opposition. On this point, ideas that were developed over the years in country opinions found their way into the general report on judicial appointments.

In the Venice Commission's Comments on the Draft Opinion of the Consultative Council of European Judges on Judicial Councils (CCJE),[39] the Venice Commission had opted for the formula of "a substantial element or a majority" of judges as members a judicial council. The

[35] CDL-AD(2007)028, paragraph 25.
[36] CDL-AD(2007)028, paragraph 29.
[37] CDL-AD(2010)004, paragraph 32.
[38] *idem*.
[39] CDL-AD(2007)032.

substantial element clause was intended to accept even slightly less than half of the members as judges. The CCJE however envisaged 75 per cent of judges as a minimum and admitted even judicial councils composed only of judges. In her comments pointing out this difference, a leading member of the Venice Commission, Ms Suchocka explicitly referred to democratic legitimacy as the argument supporting a lower number of judges.

2. Membership of the Minister of Justice

Another issue that had come up in the Commission's opinions was the participation of the minister of justice in the judicial council and whether he or she should preside it *ex officio*. Not least because of the responsibility of the minister for the judiciary towards parliament, the Commission did not exclude the minister's participation in the council. Often, as a member he or she might be an instigator of reform, which would have to be implemented by the judicial council. However, because of his or her political mandate, the minister of justice should not participate in certain decisions, especially on judicial discipline.

The CCJE also had ruled out the participation of the Minister of Justice in the Council, admitted by the Venice Commission. For the CCJE, the president of the judicial council should be elected by its members from among the judicial members, whereas the Commission had preferred a non-judicial member as the council's president.[40] In expressing this view, the Venice Commission explicitly referred to the need to avoid "corporatist tendencies within the council".[41]

3. Membership of the Prosecutor General

When the European Court of Human Rights held, in the case Volkov v. Ukraine, that the role of the Prosecutor General in the disciplinary body was problematic, its specifically referred to the Venice Commission:

> "114. The Court refers to the opinion of the Venice Commission that the inclusion of the Prosecutor General as an ex officio member of the HCJ raises further concerns, as it may have a deterrent effect on judges and be perceived as a potential threat. In particular, the Prosecutor General is placed at the top of the hierarchy of the prosecutorial system and supervises all prosecutors. In view of their functional role, prosecutors participate in many cases which judges have to decide. The presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of judges creates a risk that judges will not act impartially in such cases or that the Prosecutor General will not act impartially towards judges of whose decisions he disapproves (see paragraph 30 of the Venice Commission's Opinion cited in paragraph 79 above). The same is true with respect to the other members of the HCJ appointed by quota of the All-Ukrainian Conference of Prosecutors."

In general, the Venice Commission is of the opinion that a separation of judges and prosecutors in judicial councils is required. When there is a single judicial council for both corps, chambers need to be introduced within the council to allow for such a separation.[42]

[40] CDL-AD(2007)032, paragraphs 11 and 13.
[41] CDL-AD(2007)028, paragraph 35.
[42] CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009), para. 21; CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), para. 66.

4. Independence of the members of the Judicial Council – full time occupation

In its Volkov judgment, the European Court of Human Rights also criticised another aspect of the composition of the High Judicial Council (HJC), in particular that its members are dependent on their other occupation – including as judges:

> "113. The Court further notes that in accordance with section 19 of the HCJ Act 1998, only four members of the HCJ work there on a full-time basis. The other members continue to work and receive a salary outside the HCJ, which inevitably involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality."

This means that the members of a judicial council should work on a full-time basis in order to avoid possible pressures stemming from their other employment.

D. Probationary periods

The report on judicial appointments takes a clear stance against probationary periods for judges, because the Commission found that probation can "undermine the independence of judges". In its country related opinions, the Commission was often confronted with constitutional provisions setting out such probationary periods. The last such opinion relates to Ukraine and was adopted in October 2011, just at the moment when the former Prime Minister of Ukraine, Ms Tymoshenko, was condemned to a seven year prison sentence by a judge during his probationary period. The Commission was of the opinion that "it should be ensured that judges in these temporary positions cannot be appointed to deal with major cases with strong political implications"[43].

Some countries, unfortunately, go as far as to regulate probationary periods for judges on the level of the constitution. In order to overcome the problem that the laws, which the Commission assessed, could not contradict the constitution, the report recommended in such cases to quasi assimilate the non-confirmation of a judge in a probationary period to dismissal and called for the same guarantees as those against dismissal: citing its opinion on "the Former Yugoslav Republic of Macedonia", the Report on Judicial Appointments states that a "refusal to confirm a judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is removed from office".[44]

The Committee of Ministers' Recommendation demands that decisions on probationary periods for judges "be based on objective criteria pre-established by law or by the competent authorities"[45]. The Venice Commission has a stronger view on this point and recommends that judges be appointed permanently because probationary periods are "problematic from the view of independence"[46].

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[43] CDL-AD(2011)033, Joint Opinion on the Draft Law amending the Law on the Judiciary and the Status of Judges and other Legislative Acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), paragraph 49. See also ECtHR, case of Miroslaw Garlicki v. Poland (application no. 36921/07).

[44] CDL-AD(2007)028, paragraph 41, referring to CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the reform of the Judicial System in 'the Former Yugoslav Republic of Macedonia', paragraph 23.

[45] CM/Rec(2010)12, paragraphs 51 and 44.

[46] CDL-AD(2010)004, paragraph 38.

E. Discipline

In its Opinion no. 10, the CCJE had opted for disciplinary measures to be adopted by a judicial council reduced in its membership to judges only.[47] Here, the Venice Commission had a different approach. Because of the perceived leniency of 'judges-only' disciplinary boards, the Commission was of the opinion that disciplinary measures should be adopted in a mixed composition. The idea was that non-judicial members were more likely to hold a judge accountable than his or her peers. However, the judge sanctioned should have the possibility to appeal these measures to a court of law.[48]

As concerns disciplinary proceedings, the Commission's Report on Judicial Independence confirms the position of the Venice Commission that decisions should be made by an appeal to a court against decisions of disciplinary bodies.[49] Without explicitly referring to a court, the Committee of Ministers also recommends to "provide the judge with the right to challenge the decision and sanction"[50]. The Committee of Ministers also insists that such proceedings be conducted with all the guarantees of a fair trial and that sanctions be proportionate.

In the Volkov case, the European Court of Human Rights held that the judicial review of disciplinary cases is problematic if the review judges themselves are subject to the disciplinary body, the decisions of which they review:

> *"The Court observes that the judicial review was performed by judges of the HAC* [High Administrative Court] *who were also under the disciplinary jurisdiction of the HCJ* [High Judicial Council]*. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality (as examined above), the Court is not persuaded that the judges of the HAC considering the applicant's case, where the HCJ was a party, were able to demonstrate 'the independence and impartiality' required by Article 6 of the Convention."*[51]

This is an issue, which the Venice Commission has not yet examined. While this argument in the Volkov case is convincing, it is likely to be difficult to find a way to implement this requirement. Judges reviewing disciplinary cases would thus need a separate disciplinary system, which does not involve the disciplinary body, which is in charge of all other judges. This could finally result in a type of specialised group of "disciplinary judges", with their own disciplinary system. It seems however too early to come to any conclusion on this complex issue.

F. Budget and remuneration

In its Recommendation Rec(2010)12, the Committee of Ministers calls upon member states to allocate adequate resources, facilities and equipment to the courts.[52] The Commission goes a step further by recommending that "the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council".[53]

[47] CCJE, Opinion no. 10 on the Council for the Judiciary at the Service of Society, para. 20..
[48] CDL-AD(2008)028, paragraph 14.
[49] CDL-AD(2010)004, paragraph 43.
[50] CM/Rec(2010)12, paragraph 69.
[51] Paragraph 130.
[52] CM/Rec(2010)12, paragraph. 33.
[53] CDL-AD(2010)004, paragraph 55.

A major point of the Venice Commission's Report on the Independence of the Judiciary deals with bonuses for judges. Based on the experience in some Eastern European countries, the Venice Commission feared that bonuses and the allocation of housing could be abused in order to influence a judge. Therefore, the Commission recommends that bonuses and non-financial benefits, which involve a discretionary element, be phased out.[54] The Committee of Ministers recommends that "[s]ystems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of the judges".[55] The reference to "core remuneration" seems to allow some performance based bonuses as long as they do not constitute a major part of the revenue.

Stable salaries for judges is an essential guarantee for their independence, not least to avoid the danger of corruption of judges. Recommendation Rec(2010)12 states that *"Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions."* The Recommendation is silent however on whether in exceptional cases of economic crisis, the salaries of judges could be reduced. The Venice Commission had to reply to this question in an *amicus curiae* opinion for the Constitutional Court of "the Former Yugoslav Republic of Macedonia":

> *"… in the absence of an explicit constitutional prohibition, a reduction of the salaries of judges may in exceptional situations and under specific conditions be justified and cannot be regarded as an infringement of the independence of the judiciary. In the process of reduction of the judges' salaries, dictated by an economic crisis, proper attention shall be paid to the fact whether remuneration continues to be commensurate with the dignity of a judge's profession and his or her burden of responsibility. If the reduction does not comply with the requirement of the adequacy of remuneration, the essence of the guarantee of the stability of conditions of judge's remuneration is infringed to a degree that the basic aim, pursued by that guarantee, i.e. a proper, qualified and impartial administration of justice is threatened, even leading to a danger of corruption."*[56]

G. Judicial Immunity

Another issue, which the Commission had to address in its series of Bulgarian opinions, was judicial immunity. The Bulgarian Judiciary was rattled by allegations of corruption in the three branches of its magistracy: judges, prosecutors and investigators. Their immunity, similar to that of the members of Parliament, was deemed to be too wide. The Commission affirmed its position that judges should benefit only from functional immunity for acts performed in their judicial activity. Immunity should not shield them against intentional crimes such as taking bribes for handing down a favourable judgment. While pointing to the dangers of pressure on the judges, including from the prosecution, this position was further developed in the *amicus curiae* Brief for the Constitutional Court of Moldova on Judicial Immunity[57].

Following its line of development in country opinions, the Commission held that judges "should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)"[58].

[54] CDL-AD(2010)004, paragraph 51.
[55] CM/Rec(2010)12, paragraph 55.
[56] CDL-AD(2010)038, *Amicus Curiae* Brief for the Constitutional Court of "The former Yugoslav Republic of Macedonia" on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), para. 20.
[57] CDL-AD(2013)008, *Amicus curiae* Brief on the Immunity of Judges for the Constitutional Court of Moldova Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).
[58] CDL-AD(2010)004, paragraph 61.

Without referring to immunity as such, the Committee of Ministers came to a similar result when it stated that the "interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice"[59], read together with paragraph 71 of the Recommendation, which says: "[w]hen not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen".

H. Case allocation

On the basis of Article 6 of the European Convention on Human Rights and the right to a lawful judge found in many constitutions, the Commission came to the conclusion that the possible abuse of the allocation of sensitive cases to compliant judges by court presidents, which had been observed in some countries, should be avoided by introducing automatic case-allocation systems. The Commission discussed in detail whether such systems should be recommended to all states, how such systems could be established and under which conditions exceptions were permissible. As a result of these discussions, the Commission "strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations"[60]. While the term "to the maximum extent possible" admittedly weakens the recommendation, the Commission strengthened it by adding that: "Exceptions should be motivated". In a similar vein, the Recommendation sets out that the "allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge"[61].

Case allocation was a central issue in the Opinion on the Judiciary in Hungary[62]. The Commission stated:

> *"The allocation of cases is one of the elements of crucial importance for the impartiality of the courts. With respect to the allocation of cases, the Venice Commission - in line with Council of Europe standards[63] - holds that "the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law."[64] According to the ECtHR's case-law, the object of the term "established by law" in Article 6 ECHR is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament".[65] Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.[66] Together with the express words of Article 6 ECHR, according to which „the medium" through which access to justice under fair hearing should be ensured must not only be a tribunal established by law, but also one which is both "independent" and "impartial" in general and specific terms […], this implies that the*

[59] CM/Rec(2010)12, paragraph 68.
[60] CDL-AD(2010)004, paragraph 81.
[61] CM/Rec(2010)12, paragraph 24.
[62] Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001).
[63] Recommendation CM(2012)12, paragraph 24. [footnote numbering within this citation follows the order in this article].
[64] CDL-AD(2010)004, paragraph 81, 82.16.
[65] See *Zand v. Austria*, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.
[66] See *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paragraph 98, ECHR 2000-VII.

judges or judicial panels entrusted with specific cases should not be selected ad hoc and/or ad personam, but according to objective and transparent criteria."[67]

„The order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed. In national legislation, it is sometimes provided that the court presidents should have the power to assign cases among the individual judges. However, this power involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process."[68]

This means that an essential part of structural independence is a system which guarantees to the maximum extent possible that there is either no discretion at all in the allocation of cases or that court presidents or judges' bodies allocating cases must follow stringent criteria. These criteria, in turn, could be subject to judicial review as part of an appeal against the decision made by the judge(s) to whom the case was assigned.

V. Individual Access to Constitutional Justice

Let me now come back to constitutional courts and equivalent bodies. I will briefly expound how constitutional justice evolved in Europe before I turn to the Venice Commission's report on individual access to constitutional justice.

A. Development of constitutional justice

As you know, the idea of the constitutional review (or control) of ordinary laws originates in the USA where in 1803 the Supreme Court held that a legislative act that conflicts with the Constitution is void and cannot receive judicial application[69]. This idea spread to Europe and already during the 19th century, the Supreme Courts in Monaco, Norway[70] and Romania[71] asserted their jurisdiction not to apply unconstitutional laws.

Hans Kelsen, the drafter of the Austrian Constitution of 1920, was in favour of the idea of constitutional review but he also was of the opinion that the annulment of laws adopted by Parliament, elected by the sovereign people, should not be entrusted to the ordinary judiciary, which lacked sufficient democratic legitimacy. His novel idea was to entrust constitutional review to a specialised court – a negative legislator – which would draw its legitimacy from a specific constitutional mandate and from its special composition.[72] In its Report on the Composition of Constitutional Courts, the Venice Commission examined how specialised

[67] CDL-AD (2010)004, paragraph 77.
[68] CDL-AD(2010)004, paragraph 79.
[69] Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), CODICES [USA-1803-S-001] (the CODICES database of the Venice Commission is available at www.CODICES.CoE.int).
[70] K. M. Bruzelius, "Judicial Review within a Unified Country", http://www.venice.coe.int/WCCJ/Papers/ NOR_Bruzelius_E.pdf,
[71] G. Conac, *Une antériorité roumaine : le contrôle juridictionnel de la constitutionnalité des lois*, in *Mélanges Slobodan Milacic, Démocratie et liberté : tension, dialogue, confrontation*, Bruylant, Belgique, 2007.
[72] Hans Kelsen, General Theory of Law and State, New York (1961), p. 268.

constitutional courts are composed. The Venice Commission recommended a composition reflecting the composition of various tendencies in society. [73]

Between the two world wars specialised constitutional courts were established in Austria, in Czechoslovakia and in Liechtenstein. Because of Kelsen's origin and because of his idea to establish a specialised Constitutional Court was implemented in Austria, this mechanism is often referred to as the 'Austrian model', even though many of these courts differ considerably from the Austrian Constitutional Court. For tragic historic reasons, the original Austrian Court only existed for a short period between 1920 and 1933.[74]

Since the Second World War, specialised constitutional courts often have been introduced as a remedy against human rights violations after periods of dictatorship. We can discern three waves[75] of the establishment of such courts: first in Germany and Italy, as a reaction to Nazism and Fascism, a second wave in Spain and Portugal after end of dictatorships in these countries and finally, after the fall of the Berlin wall in former communist countries of Eastern Europe, but also in other parts of the world.[76]

The establishment of specialised constitutional courts nearly always results in some form of tension between the established ordinary judiciary and the newly created Constitutional Court.[77] Nonetheless, many countries have introduced specialised constitutional courts and this trend continues.[78] There are two main reasons for this trend: hierarchy and human rights protection:
(a) The constituent power wants to ensure the supremacy of the Constitution over ordinary law and thinks, probably rightly, that a Constitutional Court is more likely to strike down laws because the Court has been set up for this very purpose. The main task for ordinary courts is to apply laws and not to annul them. Therefore, it is much more difficult for an ordinary judge to conclude that a provision of a law is constitutional.
(b) The constituent power wants to provide for efficient human rights protection in a situation of democratic transition after the end of an authoritarian regime. In such a situation, citizens often mistrust the judiciary because it had to accommodate with the previous regime. Many judges will have acquiesced with the undemocratic situation but reforming or renewing the whole judiciary is often a painfully slow process, even if it has to be addressed on a continuous basis. In such a situation, one specialised Constitutional Court, composed of judges who have an outstanding reputation, can be established relatively quickly.

This second reason calls for the introduction of an individual complaint to the Constitutional Court. By attributing individual access to a specialised Constitutional Court, this Court should be able to correct judgements of the ordinary judiciary. If this idea is to be implemented coherently, a so-called full constitutional complaint is required. A merely normative constitutional complaint, directed against unconstitutional laws only, as it was established in several Eastern European countries, cannot fulfil this purpose. The very establishment of a Constitutional Court raises high expectations in the population, which will be deceived when they find out that very often the Constitutional Court cannot help the victims of human rights violations, because the cause of those violations was not an unconstitutional law, which can be attacked before the Constitutional Court, but 'only' the unconstitutional application of a constitutional law. Such

[73] Venice Commission, Report on the Composition of Constitutional Court, CDL-STD(1997)020.
[74] The Liechtenstein Constitutional Court has the longest uninterrupted activity of all constitutional courts. The current law in force of 2003 replaced the Law of 5 November 1925 on the Constitutional Court, Liechtenstein Legal Gazette (Landesgesetzblatt, LGBl.) 1925 No. 8.
[75] L. Solyom, *Comment*, in G. Nolte, ed., *European and US Constitutionalism,* Cambridge (2005), p. 210.
[76] For example in Asia: South Korea (1988), Mongolia (1992), Indonesia (2003).
[77] Sc. Dürr, *Individual Access to Constitutional Courts in European Transitional Countries*, in B. Fort, Bertrand, *Democratising Access to Justice in Transitional Countries (*Singapore 2006), pp 51-74.
[78] Jordan, for example introduced a specialised Constitutional Court with a constitutional amendment in 2011 and the Constitutional Court Law no.15 for the year 2012.

violations, which are much more frequent than violations due to unconstitutional laws, cannot be remedied with the normative constitutional complaint. There is a serious danger - which turned into reality in some countries - that high expectations towards the new Constitutional Court as an efficient human rights protector turn into deception and a negative attitude of at least parts of the population towards that Court.

Following the logic of the above mentioned Brighton Declaration, specialised constitutional courts should however be entrusted with a full constitutional complaint, which would be seen as an effective remedy by the European Court of Human Rights. In this vein, the Venice Commission positively assessed the project to introduce a full constitutional complaint in Hungary[79], Turkey[80] and in Macedonia[81] and called upon Ukraine to transform its normative constitutional complaint into a full constitutional complaint.[82] Recently, the Venice Commission strongly recommended Montenegro not to weaken the existing constitutional complaint by replacing the Court's powers to repeal ordinary court decisions by a mere declaration of their unconstitutionality.[83]

B. The Venice Commission's study on Constitutional Justice

The Commission's Study first distinguishes the various forms of individual access: diffuse vs. concentrated review[84], whereby diffuse control mostly exists in Northern European countries and various forms of concentrated review is prevalent in Southern and Eastern Europe. However, it is difficult to make a clear distinction between these systems. Some countries, like Portugal, have mixed systems, combining constitutional review by the ordinary courts with that of a specialised Constitutional Court.

In an opinion on Estonia, the Venice Commission recognised that the establishment of a Constitutional Chamber within a Supreme Court, like you have it in Costa Rica, is a perfectly valid option for establishing a democratic constitutional system.[85] Nonetheless most of the new democracies in the Central and Eastern Europe have opted for a specialised Constitutional Court. Such a choice necessarily results in questions of distribution of jurisdiction between the ordinary courts and the Constitutional Court and raises a series of questions, which the Study

[79] In Hungary the constitutional complaint replaced an *actio popularis*. While criticizing other aspects of constitutional reform in Hungary, the Venice Commission welcomed the introduction of the constitutional complaint: CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012); CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary - Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011) .

[80] Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004, CDL-AD(2004)024), followed by the Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011, CDL-AD(2011)040).

[81] CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014)

[82] Opinion on Proposals amending the Draft Law on the Amendments to the Constitution to strengthen the Independence of Judges of Ukraine, adopted by the Venice Commission at its 97th Plenary Session, (Venice, 6-7 December 2013), CDL-AD(2013)034, para. 11.

[83] CDL-AD(2014)033, Opinion on the Draft Law on the Constitutional Court of Montenegro, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October), para. 52.

[84] CDL-AD(2010)039rev, paragraph 34.

[85] Opinion on the Reform of Constitutional Justice in Estonia (CDL(1998)059).

tries to address. Therefore, the Study points out that a number of issues it deals with relate to countries with a specialised Constitutional Court.[86]

Another important distinction is *a priori* and *a posteriori* review.[87] A limitation to abstract *a priori* review, that is before laws are enacted, was a typical feature of the French system. However, since the 2008 constitutional reform the Priority Question of Constitutionality has provided for individual, albeit indirect access and it introduced an important shift towards the review of laws that are already in force. More and more, the Constitutional Council changes from a political to a judicial institution.[88] In other countries, *a priori* control is known in order to examine the constitutionality of treaties before they are ratified. The reason for such *a priori* control is that once a treaty is ratified, it would be difficult to remedy, *a posteriori,* a finding of unconstitutionality because the State is bound to follow the treaty under international law.

At least in theory, *a priori* examination can avoid the enactment of unconstitutional legislation. However, unconstitutional effects of legislation often are only discovered at the time of its application, in practice. Systems, which only provide for *a priori* review have to live with the absence of a remedy against unconstitutional laws if either those laws had not been submitted to *a priori* review or when the unconstitutionality only becomes evident during the application of the law.

1. Indirect access

The Venice Commission's Study continues to examine indirect access, foremost preliminary requests to the Constitutional Court[89]. When Italy, for instance, established a Constitutional Court, the constituent power chose the preliminary request as a means for individual access. When ordinary judges have to apply a legal provision deemed unconstitutional, they stay the proceedings in the case before them and send a request for constitutional review of that provision to the Constitutional Court.[90] The Constitutional Court either annuls the provision or upholds it as it constitutional[91]. When the requesting judge (the judge *a quo*) receives the reply from the Constitutional Court (the judge *ad quem*), the ordinary judge resumes the case and decides it on the basis of the decision of the Constitutional Court, (a) either applying the provision found constitutional, (b) applying it with an interpretation given by the Constitutional Court or (c) by disregarding the provision if it was found to be unconstitutional. Preliminary requests to the Constitutional Court exist in a number of countries, sometimes as the sole type of individual access (e.g. Italy, Lithuania, Romania[92], France[93]), sometimes together with a direct individual complaint (e.g. Belgium[94], Germany, Spain[95]).

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[86] CDL-AD(2010)029rev, paragraph 26.
[87] CDL-AD(2010)039rev, paragraph 44.
[88] A removal of the former Presidents of the Republic from the membership of the Council would reinforce this process and would strengthen the Council's role as an independent judicial organ.
[89] CDL-AD(2010)039rev, paragraph 56.
[90] A. Quaranta, *Il giudizio incidentale di legittima costituzionale*, CDL-JU(2012)025.
[91] The Constitutional Court of Italy has developed a number of intermediary types of judgement, which provide a specific interpretation of the law, which has to be applied to make the provision constitutional, A. D'Atena, *Interpretazioni adeguatrici, diritto vivente e sentenze interpretative della corte costituzionale*, http://www.cortecostituzionale.it/documenti/convegni_seminari/06_11_09_DAtena.pdf .
[92] A. Zegrean, *L'exception d'inconstitutionnalité à la Cour constitutionnelle de la Roumanie*, CDL-JU(2012)023.
[93] J. de Guillenchmidt, *La question prioritaire de constitutionnalité,* CDL-JU(2012)028.
[94] P. Nihoul, *Les questions préjudicielles,* CDL-JU(2012)027.
[95] R. Arribas, *"Cuestiones" posées par le juge ordinaire à la Cour constitutionnelle d'Espagne (et autres modes d'accès de l'individu à la Cour constitutionnelle),* CDL-JU(2012)024.

In some countries, all levels of the judiciary can make preliminary requests, whereas in France or now also in Jordan, lower instance judges have to send a request first to the supreme court(s) and it is the latter court(s) that finally decide whether or not to make a preliminary request to the Constitutional Court. Such a filter by the ordinary supreme court(s) has the advantage of reducing the case-load of the Constitutional Court. However, there is a serious danger that these courts take their filtering task too seriously so that important cases do not reach the Constitutional Court because the Supreme Court prefers settling the issue within the ordinary judiciary. We have seen this danger in France[96] and recently also in Jordan.

The Venice Commission recommends giving courts of all levels access to the Constitutional Court.[97] In principle, preliminary requests are less of a danger for creating conflicts between the ordinary and the constitutional judiciary than individual complaints but the (excessive) filtering of preliminary requests can easily become the source of such conflicts.

A key issue is whether the judge *a quo* is obliged to make a preliminary request or whether s/he has discretion. The Study recommends that when there is no direct individual access to constitutional courts, it would be too high a threshold condition to limit preliminary questions to circumstances where an ordinary judge is convinced of the unconstitutionality of a provision; serious doubt should suffice.[98]

The Venice Commission's Study also examines requests to the Constitutional Court by the Ombudsperson and recommends introducing such access in parallel to preliminary requests or direct constitutional complaints. Through his or her work, the ombudsman has an excellent knowledge about the application of the laws and can easily identify unconstitutional laws. As a consequence, the ombudsman should also have the possibility to request the annulment of such laws by the Constitutional Court, either in abstract form[99] or possibly by referring to a specific case.

2. Direct access

While Kelsen 'invented' specialised constitutional courts, he did not favour individual access. According to him, only State bodies should be able to appeal to the Constitutional Court[100], except for the challenge of administrative acts[101].

Various forms of direct access have been developed over time. Like Kelsen, the Venice Commission has a critical attitude towards the *actio popularis,* whereby any citizen can request the annulment of a law, even if the citizen is not affected by that law. Such a wide access can lead to a serious over burdening of the Constitutional Court. In Croatia, where an *actio popularis* exists, a single person, a retired judge, brought some 700 cases to the Constitutional

[96] Fatin-Rouge Stéfanini, Marthe, *Le filtre exercé par le Conseil d'Etat, La QPC vue du droit comparé - Mars 2013*, http://www.gerjc.univ-cezanne.fr/fileadmin/GERJC/Documents/COMMUNICATIONS/Le_filtre_exerce_par_le_Conseil_d_Etat_1.pdf.
[97] CDL-AD(2010)039rev, para. 62.
[98] CDL-AD(2010)039rev, para. 216.
[99] CDL-AD(2010)039rev, para. 62.
[100] Kelsen referred to the *actio popularis:* Hans Kelsen, Wesen und Entwicklung der Staatsgerichtsbarkeit, in: VVdStRL 5 (1929), S. 31-88 (68 f., 70, 74), available at : http://www.hans-kelsen.de/gericht.pdf (accessed 23.1.2014); see also V. Neumann, Hans Kelsen und die deutsche Staatsrechtslehre, Humboldt Forum Recht, 9/2012, p. 1. http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=269 (accessed 23.1.2014).
[101] G. Brunner, Der Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im Europäischen Raum, CDL-JU(2001)022, p. 15.

Court, which had to deal with each request.[102] Hungary replaced the *actio popularis* with an individual complaint.

The Commission's Study focuses on the individual complaint to the Constitutional Court. This term covers quite different procedures. The normative constitutional complaint can be directed only against – allegedly – unconstitutional laws, whereas the full constitutional complaint is directed against unconstitutional individual acts, no matter whether these acts are based on an unconstitutional law or not. The normative constitutional complaint has been introduced mainly in Eastern European countries (e.g. Russia, Ukraine), whereas the full constitutional complaint has been developed first in Germany. The Spanish *amparo* is a full constitutional complaint as well.

In Germany, the horrors of the Nazi regime brought about the need to establish a constitutional court not only as a "State Court", in charge of disputes between state authorities but also as a protector of human rights. The 1951 Law on the Constitutional Court of Germany introduced an individual complaint to the newly established Constitutional Court, even though the German Constitution, the Basic Law, remained silent on this issue. Only in 1969, the Basic Law was amended to provide for the individual complaint also on the constitutional level.

Most important from the viewpoint of providing an efficient multi-level human system of rights protection, the Venice Commission's Study examines whether individual complaints can function as a national filter for cases reaching the European Court of Human Rights. Starting from the need to address the heavy case-load of that Court, the Study provides advice on how to design an individual complaint so that it can become an "effective remedy" under Article 13 of the European Convention on Human Rights. The decisive criterion is, according to Article 35 of the Convention, whether the European Court of Human Rights insists on the exhaustion of a remedy or whether it accepts an application directly without insisting that such a remedy be exhausted before making an application to the Strasbourg Court.

The European Court of Human Rights will only recognise a national remedy as "effective" if this remedy can provide relief to the complainant. As a consequence, a constitutional complaint has to result in a binding judgement. For example, a mere recommendation to Parliament to amend an unconstitutional law is obviously not sufficient. The Constitutional Court also must be obliged to hear the case, i.e. there cannot be discretion on whether the Court takes on a case, and there must not be unreasonable demands as to the costs and legal representation by a lawyer for the applicant.[103]

Complaints against excessive length of procedure are a special case. Here, the Constitutional Court has to be able to order the speedy resumption of proceedings. This means that the Court has to provide not only a compensatory but also an acceleratory remedy.[104]

The Study continues to give advice on institutional design of individual complaints procedures by examining time-limits, which should be reasonable.[105] As concerns the obligation to be represented by a lawyer, the Commission insists on the availability of free legal aid also for constitutional proceedings[106]. Court fees should remain reasonable and it should be possible to reduce them in justified cases.[107] When there is a complaint against a judgement that was

[102] CDL-AD(2010)039rev, paragraph 74.
[103] CDL-AD(2010)039rev, paragraph 93.
[104] On this point see also the Venice Commission's Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), CDL-AD(2006)036, para. 173.
[105] CDL-AD(2010)039rev, paragraph 112.
[106] CDL-AD(2010)039rev, paragraph 113
[107] CDL-AD(2010)039rev, paragraph 117.

decided in favour of a third party, that party should have the opportunity to make a statement also in the constitutional complaint proceedings.[108]

Complex questions arise in relation to interim measures. According to the Commission's Study, the Constitutional Court should be able to suspend a challenged provision if its implementation would result in further damage that cannot be repaired.[109] Such powers are wide, especially given that in such a case Court has not yet decided on the constitutionality of the provision, but already suspends it with *erga omnes* effect pending the final judgement. Only serious irreparable damage can justify the suspension of legislation adopted by Parliament.

3. Standard of review – "Convention friendly" interpretation of constitutional rights

Whatever the type of appeal to the Constitutional Court may be, typically the standard of control of legislative or individual acts will be the fundamental rights of the national Constitution and not the rights provided for in the European Convention on Human Rights. Therefore, numerous questions arise when the scope of constitutional rights and the Convention rights differ. Only few Constitutional Courts use the Convention itself as the relevant standard. The Constitutional Court of Austria does so because the Austrian Constitution does not contain a human rights catalogue. The major political parties could never agree on whether such a catalogue should also contain social rights and therefore they agreed to raise the European Convention on Human Rights to the constitutional level[110]. Also due to the fact that the so-called Dayton Constitution of Bosnia and Herzegovina was part of an internationally brokered agreement to end the civil war in that country, this Constitution provides that the European Convention on Human Rights is part of the Constitution to have some kind of human rights catalogue.[111] Typically, all other specialised constitutional courts apply the human rights catalogue of their own Constitution as the standard of review. These rights can differ not only in their formulation, but also in the way how limitations are expressed, either in a specific or a general limitation clause.[112] Even if the national rights and the Convention right seem to be close textually, the interpretation which is given to them by the national Constitutional Court and the European Court of Human Rights can differ substantially. Therefore, if the individual complaint is to serve also as an effective national remedy filtering cases before they are brought before the European Court, the national rights need to be interpreted in a "convention friendly"[113] manner. This does not mean that the interpretation of these rights has to be the same for both courts. Without endangering the assessment as an effective remedy, the national complaint can be wider and can confer more freedom to the individual. However, the national interpretation should not be narrower than the European one. If the scope of the national right were

[108] CDL-AD(2010)039rev, paragraph 132.
[109] CDL-AD(2010)039rev, paragraph 149.
[110] National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council, Austria, A/HRC/WG.6/10/AUT/1, para. 9.
[111] Although this is unrelated to the issue of individual complaint, it is interesting to note that the supreme courts of the Netherlands (the Supreme Court and the State Council, which is the supreme administrative court) even use the Convention as the only standard of review in human rights matters because Article 120 of the Dutch Constitution explicitly excludes that any judge may disregard laws adopted by Parliament because the law is found to be contrary to the Constitution. Thus explicitly excluding any constitutional review, Article 120 is probably the most radical expression of parliamentary sovereignty, a remnant of the mistrust of the French revolution in the judges. Le juge « *la bouche qui prononce les paroles de la loi ; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur* », Montesquieu, De l'esprit des *lo*is (1748).
[112] This issue was the subject XIIIth Congress of the Conference of European Constitutional Courts on the "Criteria for the Limitation of Human Rights in the Practice of Constitutional Justice" (Nicosia, 16-17 October 2005), http://www.venice.coe.int/WebForms/pages/?p=02_01_01_Regional_CECC_Cyprus.
[113] Vallianatos and others v. Greece (applications nos. 29381/09 and 32684/09), partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque.

considerably narrower than the Convention right, the European Court of Human Rights would probably find that this remedy is not effective and would accept complaints without insisting in the exhaustion of this remedy.

4. Effective execution / implementation

The term "effective remedy" implies that judgments of constitutional courts have to be implemented to be effective. The Study identifies the interpretation in conformity with the Constitution as an area where implementation can easily be a problem if the ordinary courts do not follow the constitutional interpretation given by the Constitutional Court but continue to apply an interpretation of the law, which was found to be unconstitutional. Therefore, the Venice Commission recommends introducing a provision in the Constitution, which obliges all other state powers to follow a provision's interpretation given by the Constitutional Court.[114]

Unfortunately, in Europe several constitutional courts are faced with at least occasional non-implementation / execution of their judgements[115]. While the non-respect of judgements is certainly a problem of legal culture – or rather the absence of such a culture, the Courts themselves can contribute to overcome this problem. Several elements can be important: the Court should be coherent with its own case-law. There will always be new issues to be decided but to the extent possible, the case-law of a Constitutional Court should be predictable and the Court should not 'surprise' the state powers and the public. The better a judgement follows arguments expressed in earlier case-law, the better it will be accepted and, as a consequence, implemented. Courts can even construct their case-law by referring to important arguments as an *obiter dictum* in judgements where they are not decisive. In a later case, the Court can then already refer to its earlier case-law and the new case will become part of a coherent string of precedents.

5. Constitutional matters

Finally, the Report on Individual Access to Constitutional Justice, examines the relationship between Constitutional Courts and ordinary courts and identifies the danger that the Constitutional Court become a 'super-Supreme Court' or the so-called '4th instance'. Therefore, it is necessary to give a narrow scope of the term 'constitutional matter'. The definition of this concept is crucial for finding a delimitation of competences between supreme courts and the Constitutional Court. The biggest danger stems from a wide interpretation of the right to a fair trial (Article 6 of the European Convention on Human Rights). If widely interpreted, any incorrect interpretation of the law by an ordinary court or a violation of procedural law can result in a violation of the right to a fair trial, and becomes a constitutional matter giving rise to a constitutional complaint. Sometimes, constitutional courts thus 'slide' into the interpretation of ordinary law, and (supreme) ordinary courts are – rightly – upset about such interference. There is no obvious or simple solution. Not each violation of ordinary law can be a constitutional matter but some violations certainly are.[116] Here, the Study cannot provide a simple solution when it recommends: "The constitutional court should only look into 'constitutional matters', leaving the interpretation of ordinary law to the general courts. The identification of constitutional matters can, however, be difficult in relation to the right to fair trial, where any procedural violation by the ordinary courts could be seen as a violation of the right to a fair trial.

[114] CDL-AD(2010)039rev, paragraph 165.
[115] P. Paczolay, "Experience of the Execution of Constitutional Court's decisions declaring legislative omission in Hungary, Conference on "Execution of the decisions of constitutional courts: a cornershone of the process of implementation of constitutional justice" (Baku, Azerbaijan 14-15 July 2008), CDL-JU(2008)029; Synopsis of the Conference on the "Execution of decisions of Constitutional Courts" (Baku, Azerbaijan, 14-15 July 2008): Synopsis, CDL-JU(2008)051syn.
[116] On this issue see Brunner, CDL-JU(2001)022, p. 20 seq.

Some restraint by the constitutional court seems appropriate, not least in order to avoid its own overburdening, but also out of respect of the jurisdiction of ordinary courts.'[117]

VI. Asian Court of Human Rights

At the very end of my presentation let me only briefly mention that we are involved also in efforts to establish an Asian Court of Human Rights.

The origin of this initiative stems from a proposal of the President of the Constitutional Court of the Republic of Korea, Mr Park, to establish an Asian Court of Human Rights at the 3rd Congress of the World Conference on Constitutional Justice in Seoul in September 2015.

I had the pleasure to meet the Honourable Justice Prof. Chen at the CALE Conference on "Multi-layered Constitutionalization in the Context of Integration in East Asia" in Nagoya, in February of this year.

In my paper presented there, I pointed to various issues which should be addressed in preparing such a step. First, the scope *ratione loci* and notably the question whether and which international organisation could provide an institutional framework for the system. A key to success is the question which criteria participating countries should fulfil. Drawing on European organisational structures, I would favour a system of variable geometry, in which first only few likeminded countries participate. Later, partial opt-outs could be envisaged in order to enable also hesitating countries to participate but these countries should not be in a position to limit progress of the likeminded group of countries.

I also insisted that from the outset the purpose of adding a regional layer of human rights protection in Asia should be full individual access in order to achieve a high common standard of human rights protection in Asia. While the system should be specifically designed for the Asian continent, a reference to Asian values must not be used to reduce the level of protection provided. This links up to the point I made before on national tradition, which are sometimes used by corrupt regimes to deflect criticism of their human rights record.

The necessary dialogue on establishing an Asian Court would necessarily involve many actors (universities, civil society, constitutional and supreme courts, etc.), even if eventually a treaty will have to be prepared by governments.

Obviously this is a long term project and will need serious preparation before it is ripe for implementation. The Venice Commission remains ready to assist in this important endeavour and to provide experience accumulated with the European Court of Human Rights.

VII. Conclusion

Honourable Chief Justice,

I have tried to give you an overview of the work of the Council of Europe, the Venice Commission and the World Conference on Constitutional Justice. We have seen that the 47 member state Council of Europe is the oldest pan-European institution, that it is a classical intergovernmental organisation, as opposed to the supra-national European Union.

[117] CDL-AD(2010)039rev, para. 211.

We have also discussed the special role of the Venice Commission within the Council of Europe, being composed of independent members from its 60 member States, many of which come from out of Europe. This Commission gives advice to its member States and international organisations on constitutional issues in the wide sense, including electoral law, legislation on specific human rights or legislation on the Judiciary.

The Venice Commission is very actively cooperating with constitutional courts and equivalent institutions, by publishing their decisions in the Bulletin on Constitutional Case-Law and the CODICES database. The electronic Venice Forum allows the Courts to exchange information quickly between them.

The Venice Commission also acts as the Secretariat of the World Conference on Constitutional Justice, which met the first time in 2009, was formally established in 2011 and which already counts 97 members from all five continents.

We have also seen that through its opinions, reports and studies, the Venice Commission is very active in supporting individual access to constitutional justice and the independence of the judiciary. In the countries where the Venice Commission is most active, direct access to Constitutional Courts is often limited. The Venice Commission tries to convince constitution drafters to provide wide access to these Courts.

The Venice Commission found that in the new democracies which it assists, the establishment of an independent judiciary often proved to be even more difficult than setting up other democratic institutions such as a pluralistic parliament or a functioning electoral system. The reasons for these persistent problems are complex, starting with a low esteem of the profession of judges in some countries, an overwhelmingly strong position of prosecutors, underfunding of the judicial system and problems of corruption, to name but a few.

While the Venice Commission did not cover all aspects of the life of the judiciary, its opinions and reports were always geared towards assisting its member states, both in old and new democracies, in establishing and further developing a judiciary that is independent and provides an impartial service to all. Democracy is unthinkable without an independent judiciary. An independent judiciary is the core of the rule of law.

Ladies and Gentlemen,

Please do not hesitate to ask me about further details both in the institutions, which I presented but also on the issues of substance related to the independence of the judiciary and notably the role of constitutional justice in the work of the Venice Commission.

Thank you very much for your attention.